

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE MCDERMOTT,
Plaintiff,

v.

JOHN P. POTTER, et al.,
Defendants.

NO. 09-1008RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on the Defendants' motion to dismiss (Dkt. # 7). No party requested oral argument, and the court finds the motion suitable for disposition on the basis of the parties' briefing and supporting evidence. For the reasons explained below, the court GRANTS the Defendants' motion (Dkt. # 7).

II. BACKGROUND

Plaintiff Lance McDermott is employed by the United States Postal Service ("USPS"), and in this lawsuit seeks damages for alleged employment discrimination. In 2006, Mr. McDermott filed complaints with the Equal Employment Opportunity Commission ("EEOC") alleging age and sex discrimination, and those complaints were consolidated into one EEOC action. Mr. McDermott filed a notice of intent to

1 sue with regard to that EEOC action on January 8, 2007, and on October 2, 2008, Mr.
2 McDermott received a right-to-sue letter from the EEOC.

3 Mr. McDermott also filed an EEOC complaint on May 3, 2007, alleging age
4 discrimination and retaliation, which was consolidated with his March 28, 2008 EEOC
5 complaint alleging sex discrimination and retaliation. Mr. Dermott received a right-to-
6 sue letter from the EEOC with regard to that consolidated action on November 10,
7 2008.
8

9 Mr. McDermott filed a lawsuit in this judicial district on December 29, 2008, to
10 redress the injuries described in his EEOC complaints. *See McDermott v. Potter*, Case
11 No. CV08-1846-JCC (W.D. Wash.). On March 12, 2009, Mr. McDermott filed a
12 motion for default judgment. On March 23, 2009, USPS filed a motion to dismiss for
13 lack of service. Mr. McDermott filed a motion for sanctions against the USPS. On
14 May 29, 2009, the court granted the motion to dismiss without prejudice. Mr.
15 McDermott moved for reconsideration, requesting that the court permit him additional
16 time to effectuate service. The court denied Mr. McDermott's motion and specifically
17 denied his request for additional time to effectuate service, due to Mr. McDermott's
18 filing a frivolous sanctions motion, but specifically noted that a dismissal without
19 prejudice would allow him to "re-file the action and follow the proper rules for service
20 and establishing personal jurisdiction." Order (Case No. CV08-1846-JCC, Dkt. # 22)
21 at 2.
22

23 Mr. McDermott did not appeal that dismissal, but instead filed the same
24 complaint to institute this action on July 16, 2009. The Defendants — who include
25 USPS, USPS government officials, the United States Attorney General, and the United
26

1 States Attorney for this judicial district — have moved to dismiss this action as time-
2 barred.

3 4 **III. ANALYSIS**

5 **A. Legal Standards.**

6 To withstand a motion to dismiss for failure to state a claim, a complaint must
7 plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
8 *Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). All factual allegations are considered
9 true and viewed in the light most favorable to the nonmoving party. *See Associated*
10 *Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998). If a
11 plaintiff fails to allege a cognizable legal theory or sufficient facts to support a
12 cognizable legal theory, the court may dismiss the action for failure to state a claim.
13 *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

14 **B. Plaintiff has Failed to Allege a Cognizable Legal Theory as to Any of his** 15 **Claims.**

16 **1. Plaintiff’s Title VII Claims are Time-Barred.**

17 An employee must file a Title VII employment discrimination claim in district
18 court within ninety days of receiving a right-to-sue letter from the EEOC. 42 U.S.C. §
19 2000e-16(c). If the employee misses this deadline, a court action is time-barred. *See*
20 *Nelmisda v. Shelly Eurocars, Inc.*, 112 F.3d 380, 383 (9th Cir. 1997). Courts apply
21 equitable tolling to this statute of limitations “sparingly,” not typically in situations
22 where a missed deadline is ““due to claimant’s failure “to exercise due diligence in
23 preserving his legal rights.”” *Id.*, 112 F.3d at 384 (quoting *Scholar v. Pacific Bell*, 963
24 F.2d 264, 267 (9th Cir. 1992) (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89,
25 96 (1990))). Equitable tolling is appropriate where a claimant files a timely but
26

1 defective pleading, where a claimant has been induced or tricked into missing the
2 deadline, or where the defendant's wrongdoing contributes to the claimant's failure to
3 timely file. *See Irwin*, 498 U.S. at 457-58; *O'Donnell v. Vencor, Inc.*, 465 F.3d 1063,
4 1066 (9th Cir. 2006). But where a claimant's untimeliness is based on his or her own
5 lack of diligence, a court should not apply equitable tolling, even if the claimant is
6 proceeding *pro se*. *See Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151
7 (1984).
8

9 It is undisputed that Mr. McDermott did not file this lawsuit within ninety days
10 of receiving his right-to-sue letter from the EEOC. He filed this lawsuit on July 16,
11 2009, even though his statutory periods ran on December 21, 2008, and February 9,
12 2009, for his Title VII claims. That his previous lawsuit (CV08-1846-JCC) was timely
13 filed and dismissed without prejudice is irrelevant, because that lawsuit was dismissed
14 due to Mr. McDermott's failure to effectuate service despite warning. Mr. McDermott
15 had ample opportunity to correct defective service in the previous timely case, but did
16 not do so and instead filed this untimely lawsuit. Because Mr. McDermott's
17 untimeliness stems from his own lack of diligence, there is no equitable reason to toll
18 the statute of limitations. *See, e.g., Baldwin County Welcome Ctr.*, 466 U.S. at 151
19 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack
20 of diligence.")
21

22 Furthermore, to whatever extent Mr. McDermott believes that this second
23 lawsuit "relates back" to the complaint he filed in the first lawsuit, he is mistaken.
24 This lawsuit constitutes an entirely separate action. *See* Fed. R. Civ. P. 15(c)(2); *see*
25 *also O'Donnell*, 466 F.3d at 1111 ("[Plaintiff's] second complaint does not 'relate
26

1 back' to her first complaint because her second complaint was a separate filing.")
2 Thus, because Mr. McDermott's complaint in this lawsuit was filed after the ninety-
3 day period had passed, his Title VII claims fail as a matter of law.
4

5 **2. Plaintiff's ADEA Claims are Time-Barred.**

6 Mr. McDermott requests that even if his EEOC claims are found to be time-
7 barred, the court permit his Age Discrimination and Employment Act ("ADEA")
8 claims to go forward. *See* Complaint at 132. But Mr. McDermott's ADEA claims are
9 also subject to a ninety-day filing requirement, see 29 U.S.C. § 626(e), so they are
10 time-barred for the same reasons described in the previous section. For the same
11 reasons as described in the previous section, the court will not toll the statute of
12 limitations on Mr. McDermott's ADEA claims because there is no equitable reason to
13 do so.

14 **3. Plaintiff's Whistleblower Protection Act Claims Fail as a Matter of Law.**

15 In his Opposition, Mr. McDermott contends that the Defendants' motion to
16 dismiss fails to address his retaliation allegations under the Whistleblower Protection
17 Act ("WPA"), 5 U.S.C. § 1221. The Defendants' Reply argues that Mr. McDermott's
18 complaint did not clearly describe retaliation claims under the WPA, but that to
19 whatever extent he is attempting to raise such claims, they fail as a matter of law
20 because USPS employees cannot bring an independent action under the WPA. *See*
21 *Booker v. Merit Sys. Protection Bd.*, 982 F.2d 517, 519 (Fed. Cir. 1992); *Dumaguit v.*
22 *Potter*, 2008 WL 413733 *15 (N.D. Cal. Feb. 13, 2008). Because the WPA does not
23 apply, Mr. McDermott's WPA claims fail as a matter of law.
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IV. CONCLUSION

For the foregoing reasons, the court GRANTS Defendants' motion (Dkt. # 7).

DATED this 10th day of May, 2010.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Judge